IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION.

FIRST APPEAL NO.191 OF 1993.

Shivkumar Sangappa Malghan : Appellant.

versus

Pramod Shridhar Dali : Respondent.

Mr.V.Y.Sanglikar for the appellant.

Mr.R.A.Shaikh for the respondent.

CORAM : D.G.DESHPANDE,J.

DATED : 9th February 2005.

ORAL ORDER

1. Heard advocates for the appellant and the respondent. Appellant is the original defendant. The respondent/plaintiff filed a suit against him for a declaration of ownership of a truck; for possession and for damages. The defendant appeared before the Court, but did not file his written statement. Therefore, exparte decree

came to be passed against him.

2. So far as truck is concerned, it was already taken possession of by the Maharashtra State Financial Corporation and sold in auction for recovering the amount of loan advanced to the plaintiff. In the plaint itself the plaintiff has stated that up to 12th June 1990 the truck was in his possession and on 12th June 1990 the truck was taken from his possession pursuant to the order of the Magistrate at Mudhol, though at the instant of the defendant and, as per para 9 the plaintiff claimed Rs.500/- per day towards damages total amounting to Rs.21,000/- i.e. for 42 days.

3. Counsel for the appellant/defendant contended that if he had moved the Magistrate at Mudhol by a complaint and the truck was taken in possession of pursuant to the order of Magistrate, then the defendant cannot be made liable to pay damages. He also pointed out that only because the defendant was absent, the court could not have awarded the decree and damages in the absence of any evidence. He drew my attention to para 5 of the judgment wherein the

Judge has stated - "The plaintiff has claimed sum of Rs.21,000/- by way of damages at the rate of Rs.500/- per day from 14th December 1989. The defendant has not challenged the aforesaid evidence submitted by the plaintiff. Under such circumstances no way has been left for the Court than to accept the case of the plaintiff and allow his claim of damages."

4. Counsel for the appellant, therefore, contended that firstly the observations of the Court below that the plaintiff was entitled to claim damages from 14th December 1989 were contrary to the pleadings of the plaintiff. Because the plaintiff has claimed the damages from 12.6.1990. Secondly according to him and as stated above, if the possession of the truck was taken pursuant to the order of the Court then the defendant could not be held liable and; thirdly, the damages are required to be proved by clear, cogent and convincing evidence and, there is no evidence in that regard.

5. I find that there is a substance in what is stated and contended by the advocate for the appellant. From the plaint it is clear that the

truck was in possession of the plaintiff up to 12th June 1990 and it was taken away pursuant to the order of the Court. Firstly, therefore, the defendant will not be liable to pay damages, unless the plaintiff succeeds in proving that his application to the magistrate was malafide. Secondly, granting other reliefs of injunction etc. is a different thing, because the plaintiff has succeeded in proving the ownership over the truck. But awarding damages without any evidence in that regard is not at all justified. Rest of the decree as prayed for by the plaintiff has been satisfied.

. The question involved in this appeal is only for damages. I do not find that the plaintiff has succeeded in making out a case for damages for specific and fixed amount of Rs.21,000/- at the rate of Rs.500/- per day. Therefore, this appeal is required to be allowed. Hence the order :-

:ORDER:

The appeal is allowed.

The decree of the trial Court to the extent of awarding damages of Rs.21,000/- to the plaintiff is set aside & the claim of plaintiff in that regard is dismissed.

In these circumstances of the case, there will be no order as to costs.

Certified copy expedited.

[D.G.DESHPANDE]

09/02/2005 JUDGE.